Supreme Court, U. S.
FILED
JUN 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78- 77-1849

CHICAGO SHERATON CORPORATION,
AN ILLINOIS CORPORATION,

Appellant,

vs.

SEYMOUR ZABAN AND HARRY H. SEMROW, INDIVIDUALLY AND AS MEMBERS OF THE COOK COUNTY BOARD OF APPEALS; THOMAS M. TULLY, COOK COUNTY ASSESSOR; STANLEY T. KUSPER, JR., COOK COUNTY CLERK; AND EDWARD J. ROSEWELL, COOK COUNTY TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of Illinois, entered on January 20, 1978, affirming the dismissal of its complaint, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported in 71 Ill. 2d 85 and in 373 N. E. 2d 1318; a copy is attached hereto as Appendix A. Rehearing was denied without opinion;

a copy of the notification of the denial is attached as Appendix B. The judgment order of the Circuit Court of Cook County, Illinois, is not reported; a copy is attached as Appendix C.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, in a companion proceeding captioned *Chicago Sheraton Corp.* v. *Zaban, et al.*, No. 78-C-463 (now on appeal to the United States Court of Appeals for the Seventh Circuit, No. 78-1392), has not yet been reported; a copy of the order with opinion and of the judgment is attached as Appendix D.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

(i) *The nature of the proceeding.* Plaintiff-appellant, a real property owner, brought an action in equity in the Circuit Court of Cook County [Illinois], Chancery Division, to compel the defendant members of the Board of [Tax] Appeals of Cook County to endorse the defendant Assessor's attempt to correct a clerical error of $2.66 million which he had admittedly made in the assessment of plaintiff's hotel. Three years after the provisionally corrected tax bills had been paid, and when no other form of review was available, the defendant Board members had held a "hearing" and refused without explanation to endorse the correction. The Circuit Court of Cook County dismissed the complaint. This is an appeal from the decision of the Supreme Court of Illinois affirming the dismissal.

(ii) *The judgment or decree sought to be reviewed* was dated and entered on January 20, 1978, and is embodied in the Opinion of the Supreme Court of Illinois (App. A., *post* at p. A1). A timely petition for rehearing was filed, and was denied by order dated and entered on March 30, 1978 (App. B., *post* at p. A10). The notice of appeal to this Court was filed in the Supreme Court of Illinois on May 11, 1978 (App. G., *post* at p. A20).

(iii) *The statutory provision believed to confer on this Court jurisdiction of the appeal* is 28 U. S. C. § 1257(2).

(iv) *Cases believed to sustain the jurisdiction* include *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127 (1907), and *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930).

(v) *The State statute whose invalidity is involved* is Section 123 of the Illinois "Revenue Act of 1939" (as amended by P. A. 77-1466, § 1, effective September 7, 1971); ILL. REV. STAT. ch. 120, § 604 (1975), p. 1092, as follows:

Use of Certificates of Error as Evidence in Court

> In counties containing 1,000,000 or more inhabitants, if, at any time before judgment is rendered in any proceeding to collect or to enjoin the collection of taxes based upon any assessment of any property belonging to any person or corporation, the county assessor shall discover an error or mistake in such assessment, such assessor shall execute a certificate setting forth the nature of such error, and the cause or causes which operated to produce it. The certificate when endorsed by the board of appeals showing its concurrence therein, and not otherwise, may be received in evidence in any court of competent jurisdiction, and when so introduced in evidence such certificate shall become a part of the court records, and shall not be removed from the files except upon the order of the court.
>
> A certificate executed pursuant to this Section may be issued to the person erroneously assessed or may be presented by the assessor to the court as an objection in the application for judgment and order of sale for the year in relation to which the certificate is made.

The above statute, in its form prior to the amendment of 1971, is set forth as Appendix E. The statute, in its form after amendment of August 1, 1977, is set forth as Appendix F.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a State may, consistent with the Due Process clause of the Fourteenth Amendment to the United States Constitution, provide a statutory procedure for correcting the assessment of real property, entice thousands of taxpayers each year to use that procedure, not require a hearing or give a taxpayer a right to participate, delay final approval until no alternative procedure is available, and then preclude taxpayers from challenging any irregularities in the proceedings, including fraud.
2. Whether a State may, consistent with the Due Process clause of the Fourteenth Amendment to the United States Constitution, provide a statutory procedure for assessing or correcting the assessment of real property which (a) does not require a hearing at any stage of the proceeding, (b) does not give the taxpayer a right to participate in the proceeding, and (c) does not give the taxpayer a right to challenge any irregularities in the proceeding, including fraud, and excuse these defects on the ground that the taxpayer could at one time have elected an alternative procedure for his assessment.
3. Whether Section 123 of the Illinois Revenue Act of 1939 (as it existed from September 7, 1971 until August 1, 1977) was, by reason of elements (a), (b) and/or (c) set forth in "2," above, repugnant on its face, and as construed and applied, to the Due Process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT.

In substance, Illinois in 1971 established a statutory "certificate of error" procedure for correction of those real property tax assessment errors in Cook County[1] which the Assessor admitted were his fault; some eight to twenty thousand taxpayers annually[2] utilized that procedure. A clerical error of $2.66 million was made (and was admitted) by the Assessor in assessing the plaintiff's hotel; all the defendants concede that this error resulted in a constructively fraudulent[3] assessment and tax. The plaintiff meticulously followed the certificate of error procedure to have the error (actually errors) corrected. Three years later the defendant Board members held a mock hearing and then arbitrarily refused to endorse the correction. The Illinois Supreme Court, without mentioning any federal issues, held that neither this plaintiff nor any of the thousands of other taxpayers similarly situated have either "a statutory nor constitutional right to participate in the certificate of error proceeding or to challenge any alleged irregularities in that proceeding."[4]

Stating the facts in more detail:

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1. Applicability of the statute, *supra* at p. 3, to "counties containing 1,000,000 or more inhabitants" means to Cook County only. Cook County includes the city of Chicago.

2. Ganz, et al., *Review of Real Estate Assessments—Cook County (Chicago)* v. *Remainder of Illinois*, 11 JOHN MARSHALL J. PRACT. & PROC. 17, 31 n. 59 (1977), hereinafter "GANZ." This is just under the number of taxpayers who followed the "legal" procedure discussed *infra;* see GANZ at p. 31, n. 61.

3. "Constructive fraud," as defined in *Clarendon Associates* v. *Korzen*, 56 Ill. 2d 101, 306 N. E. 2d 299, 301 (1974), is where there is "over-evaluation . . . so excessive that it was not honestly made", where "property is assessed disproportionately higher than other similar property," or where "the assessed value is reached under circumstances showing either a lack of knowledge of known values or a deliberate fixing of values contrary to known value."

4. App. A., *post* at p. A6.

Assessment Review Procedures in 1972.

In 1972, Cook County had several different procedures for the correction or revision of an erroneous real property tax assessment. Three[5] are relevant here.

The *administrative*, or "certificate of error," procedure, under a statute[6] which had been made applicable the year before, called for the Assessor who "discover[s] an error or mistake", to "execute" a certificate of error "setting forth the nature of such error and the cause or causes which operated to produce it"; for the Board of Appeals to "endorse [it] showing its concurrence therein", and then for it to be presented to the Circuit Court of Cook County in the Collector's (i.e., the defendant Treasurer's) annual application for judgment and sale of unpaid or disputed taxes.[7]

The second, which we here call the *legal* procedure,[8] required a timely valuation complaint before the Board of Appeals;[9] if this was unavailing, the taxpayer had to pay the tax in full under protest,[10] and then appear in court and object to the

5. The three procedures, with their present qualifications, are discussed in detail in Gore, *Real Estate Tax Assessments—A Study of Illinois Taxpayers' Judicial Remedies*, 24 DEPAUL L. REV. 465 (1975); Gardner, *Judicial Developments in the Taxation of Real Property since the Adoption of the Illinois Constitution of 1970*, 9 JOHN MARSHALL J. PRACT. & PROC. 333 (1976); and in GANZ, *supra* at n. 2.

6. See *supra* at p. 3.

7. ILL. REV. STAT., ch. 120, §§ 705-718; Sections 224-237 of the Revenue Act.

8. The statutory provisions underlying the legal procedure are of no direct relevance to this appeal. They are, however, identified *infra* and are explained in *Clarendon Associates, supra* at n. 3, and in *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F. 2d 439 (7th Cir. 1975), *cert. denied*, 423 U. S. 1073 (1973), *reh. denied* 424 U. S. 959, *supplemental opinion on denial of second reh.*, 551 F. 2d 1093 (7th Cir. 1977).

9. ILL. REV. STAT., ch. 120, § 598 and § 599; Sections 117 and 118 of the Revenue Act.

10. ILL. REV. STAT., ch. 120, § 675; Section 194 of the Revenue Act.

Collector's application.[11] The taxpayer has a right to challenge the assessment in court, but (with certain exceptions not here relevant) only on the ground of actual or constructive fraud.[12]

The third was an *equitable* procedure. If the assessment was fraudulent—either actually or constructively—a court of equity had jurisdiction to enjoin the tax. There was then no requirement of exhaustion or unavailability of the legal remedy.[13]

The 1972 Assessment of the Hotel.

By statute[14] in Illinois, Cook County is divided into four quadrants for real property tax assessment purposes. Each quadrant is reassessed, in sequence, once every four years. The plaintiff's hotel was reassessed for the 1972 quadrennial tax year.

The 1972 tax year was the first year that the Assessor began using its new IBM computer. Probably due to lack of experience, in transferring data from its property records applicable to the plaintiff's hotel into computer-readable media a number of clerical or transcription errors were made.[15] These resulted in an assessment that was $2,660,183 higher than the correct one, and a corresponding tax that was $338,460.83 too high.

11. See *supra* at n. 7.

12. See GANZ at p. 38, *supra* at n. 2.

13. This procedure was explained, and abrogated, in *Clarendon Associates, supra* at n. 3. See also *infra* at p. 8.

14. ILL. REV. STAT., ch. 120, § 524; Section 43 of the Revenue Act.

15. The Assessor's property record cards, obtained through discovery in the State action and annexed to the Complaint in the related federal court action (see *infra*), contain the following notations:

"Property computed in error . . ."

". . . delete lines duplicated by IBM error . . ."

"Increased in IBM error. . . ."

". . . C of E correct IBM error in land assessment. Duplication. Also correct Duplication of Bldg. I. B. M. error."

Plaintiff immediately complained[16] to the Assessor, who after investigation[17] assured him that certificates of error would be processed. When the 1972 tax bills came out (in late March or early April 1973), the Assessor stamped each of them (on May 3, 1973) with a "Certificate of Error"; the defendant Treasurer recomputed the bills to show the correct amount; and plaintiff paid the corrected bills in full. The time for filing a valuation complaint had expired on February 13, 1973.

For the remaining three years of the quadrennium, the bills were, with the assent of all defendants, sent out for the corrected amounts.

Elimination of the Equitable Remedy in 1974.

In 1974, the previously available equitable remedy was, to all intents and purposes, eliminated by *Clarendon Associates* v. *Korzen*, 56 Ill. 2d 101, 306 N. E. 2d 799 (1974).[18] *Clarendon*

16. The hotel's attorney detected the errors prior to the statutory publication of the (erroneous) assessment and prior to the statutory publication of notice (ILL. REV. STAT., ch. 120, § 596; Section 115 of the Revenue Act. See also ILL. REV. STAT., ch. 120, § 585; Section 104 of the Revenue Act) setting the time (from January 29 until February 13, 1973) for filing valuation complaints before the Board. He obtained the assessor's verbal assurance that certificates of error would be processed, as in fact they later were. Accordingly, he did not file a valuation complaint. These events were not recited in the original Complaint, as the defense of their having been an alternative (legal) remedy was raised by the defendants' motion to dismiss. The plaintiff's brief to the Illinois Supreme Court specifically raised and argued the matter; plaintiff also contended that notice by publication was ineffective where there was prior actual notice of the correct assessment. Further, we have contended in the Court below and in the federal action, and the defendants have never disputed, that the practice of the Board was to dismiss complaints if a certificate of error was pending. Moreover, less than 10% of the certificate of error holders would file a complaint with the Board. See n. 30, *infra*.

17. See *supra* at n. 15.

18. See *supra* at n. 3. The defendants, in the federal action in district court, argued that *Clarendon* had not changed the law. It is unlikely that this contention will be maintained here. *Clarendon* was a consolidated appeal from nine decisions in favor of taxpayers, and the County's brief in *Clarendon* stated that "approximately one

(Footnote continued on next page.)

held that the existence of an adequate legal remedy precluded independent equitable jurisdiction for constructive fraud. Over two dissents, the holding was made retroactive.

The "Hearing" in 1976.

In July 1976, three years after the corrected 1972 taxes had been paid, the Board held a perfunctory hearing on whether it would endorse the certificates of error. Plaintiff's counsel appeared. The Assessor's records showing the admitted clerical errors were presented; there was no contrary evidence. But, for no reason either stated or apparent, the Board refused to endorse the certificates.

The Circuit Court Action.

Plaintiff then brought an action in the Circuit Court of Cook County, Chancery Division, contending that the Board's refusal to endorse the certificates of error, and the resulting assessment and tax, violated various provisions of State and federal law, including the Due Process clause of the Fourteenth Amendment to the U. S. Constitution.

The federal questions herein were raised in the original Complaint filed in the Circuit Court of Cook County. They were raised in Count II, specifically paragraph 28(c) thereof, which asserted, after recital of the facts, that "said assessed valuation increases are void as being a denial of due process, in violation . . . of the 'due process' clause of the 14th Amendment, Sec. 1, of the Constitution of the United States." These issues were again asserted in plaintiff's briefs and arguments to the Circuit Court, and in its briefs and arguments to the Illinois Supreme Court.

(Footnote continued from preceding page.)

hundred" other cases were pending. Thus the bench and the bar agreed on *pre-Clarendon* law. The *Clarendon* opinion, on its face, acknowledges that the law was changed ("we do not think this should continue," "no apparent reason for continuing," 306 N. E. 2d at 302; see also the dissents). The Seventh Circuit Court of Appeals considered *Clarendon* in *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F. 2d 439 (7th Cir. 1975), *cert. denied*, 423 U. S. 1073 (1976).

(Facial repugnancy of the statute to the Due Process clause of the Fourteenth Amendment was raised for the first time in plaintiff's reply brief in the Illinois Supreme Court. Plaintiff's main brief therein had asserted that the statute implicitly required a fair hearing and could not, consistent with the U. S. Constitution, be construed to provide a non-reviewable assessment correction procedure; the defendants' brief therein responded that the statute did not require a hearing. Plaintiff's reply brief argued that, if so construed, this was an "implicit concession . . . that . . . necessarily means that [the statute] is fatally defective under the Federal . . . Due Process Clause.")

The defendants moved to dismiss for failure to state a claim. With their motion they submitted proofs, which are not contested, that statutory notice[19] by publication had appeared informing the public of the time for filing valuation complaints with the Board.

The Circuit Court of Cook County, without written or oral opinion, dismissed the complaint.[20]

The Illinois Supreme Court Appeal.

Inasmuch as this was the first case under the new certificate of error statute, on plaintiff's motion a discretionary[21] direct appeal to the Supreme Court of Illinois was authorized and was taken. Plaintiff in that Court made three arguments.

First, an administrative tribunal's arbitrary refusal to correct an admitted clerical error, where it results in a fraudulent tax assessment, is outrageous. Defendants conceded this at oral argument, and the Illinois Court accepted the concession: ". . . defendants concede that at this stage of the case 'there is no dispute

19. See *infra* at n. 16.

20. App. C, *post* at p. A11.

21. Rule 302(b), Rules of the Supreme Court of Illinois (". . . in a case in which the public interest requires prompt adjudication by the Supreme Court, the Supreme Court or a justice thereof may order that the appeal be taken directly to it").

as to the quadrennial assessment being constructively fraudulent'."[22]

Second, under Illinois law, the certificate of error procedure was invalid on its face and as applied: there was no adequate notice for the hearing; the statute did not even purport to grant a hearing; no hearing was in fact held at a meaningful time or in a meaningful manner; the Board did not render a decision on the record; the Board failed to give any reason for its refusal to endorse; and the refusal resulted in a constructively fraudulent assessment and tax.

The Illinois Supreme Court rejected these arguments. It held that the administrative procedure and the legal procedure were alternatives:

> "[T]he certificate of error procedure . . . is intended to be separate and distinct from the [legal] procedure available to a taxpayer. . . ."[23]

The former was not intended to involve the taxpayer:

> "We are of the opinion that the General Assembly intended the certificate of error procedure to be an expeditious summary process, without participation by the taxpayer, for correcting the assessor's errors."[24]

Thus, failure of the administrative procedure to grant a meaningful hearing—or any hearing—was of no moment, since the taxpayer had an available *alternative* procedure which it could at one time have used, and which was constitutional, namely the legal one:

> "We hold that [the certificate of error statute] did not require the board of appeals to hold a hearing concerning the certificate of error and plaintiff had neither a statutory nor constitutional right to participate in the certificate of error proceeding or to challenge any alleged irregularities in that proceeding."[25]

22. App. A, *post* at pp. A6 and A7.

23. App. A, *post* at p. A5.

24. App. A, *post* at p. A6.

25. App. A, *post* at p. A6.

Third, plaintiff contended that the procedural defects noted above were also repugnant to the Due Process clause of the Fourteenth Amendment to the United States Constitution. Some twenty decisions of this Court were cited to the Illinois Court. Plaintiff primarily relied on *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127 (1907), for the propositions that (1) where a State provides two assessment procedures, each must afford a fair hearing,[26] (2) the hearing must be required by statute rather than granted as a matter of grace,[27] and (3) judicial review cannot be limited to instances of fraud or corruption. Plaintiff also relied on *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930), to demonstrate that the certificate of error statute was unconstitutional as applied: a State cannot say that a party should have taken an alternative remedy when in fact one alternative (the legal one) was not available at that time, and neither it nor another (the equitable one) was any longer available when the remedy selected was ultimately turned down.

The Supreme Court of Illinois did not expressly pass upon the federal constitutional issues.[28] While its opinion does not cite any decision of this Court or of any other federal court, or the Due Process clause of the Fourteenth Amendment to the United States Constitution, it of course could not have affirmed the decision below without necessarily resolving the constitutional questions against the plaintiff. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 682 (1930). Whether the Illinois Court's decision was a rejection of the federal issues *sub silentio* or a failure or refusal to consider them is less a matter of substance than of semantics; the decision in the companion proceeding in the U. S. District

26. Cited and relied upon in *Fuentes* v. *Shevin*, 407 U. S. 67, 88 (1972), *inter alia*.

27. Cited and relied upon in *In re Gault*, 387 U. S. 1, 73 (1967) (Harlan, J., concurring and dissenting), *inter alia*.

28. References in the opinion, App. A., *post* at p. A6, to "constitutional," "due process," and "due process clause" are ambiguous, and could refer equally well to the State or to the United States Constitutions. Illinois, as do all of the States, has a due process clause in its Constitution. ILL. CONST., art. 1, § 2.

Court[29] has held that "[i]t appears that plaintiff raised and litigated its federal claim of denial of due process before the Illinois Supreme Court . . . and that the Illinois Supreme Court decided the federal due process claim." (The defendants are presently urging on appeal in the federal action that *res judicata* should apply because "[t]he Illinois Supreme Court rejected the plaintiff's due process argument.")

Rehearing by the Supreme Court of Illinois was sought but was denied.

Further Amendment of the Statute.

While plaintiff's action was pending in the Illinois Supreme Court, the Assessor, over the objection of the Board,[30] sponsored an amendment of the certificate of error statute. The amended statute eliminated the future role of the Board in endorsing certificates of error but did not apply retroactively; *i.e.*, to the assessment at bar.[31]

The Federal Court Action.

Shortly after the Illinois Supreme Court's decision came down, but before the time for petitioning for rehearing had lapsed, negotiations for the sale of the plaintiff's hotel reached a point where it became imperative to resolve the tax liability. An action under 42 U. S. C. § 1983 and 28 U. S. C. § 2201, and their

29. App. D., *post* at pp. A14 and A15.

30. An article in the Chicago Daily News for May 24, 1977, p. 4, reported on the initial bill to amend the certificate of error statute:

> "After [defendant Board member] Semrow privately objected to the bill's contents, [defendant Assessor] Tully's office last week agreed to draft an amendment for submission in the House. It will provide that Semrow's office can continue to review certificates awarded by Tully in cases that previously had come before the Board of Appeals.
>
> "However, an assessor's spokesman conceded that that probably would involve no more than 10 per cent of the changes put through."

31. App. F., *post* at p. A18.

counterpart jurisdictional statutes, 28 U. S. C. § 1343(3) and 28 U. S. C. § 1331, was then brought in the United States District Court for the Northern District of Illinois.[32] Plaintiff asserted that the failure of the Illinois Court specifically to treat with the federal issues established that there was no "plain, speedy and efficient remedy . . . in the court of such State" (28 U. S. C. § 1341). Plaintiff moved for a preliminary injunction against enforcement of the tax liability and accrual of the monthly interest penalty, and offered to pay the disputed tax and penalty. The trial court was unable to decide plaintiff's motion before the closing date of the sale, and as a consequence the $338,460.83 tax and the $186,158 penalty were paid in full.[33]

The defendants objected to the motion for injunction, and moved to dismiss the Complaint. Their motion was granted[34] on four separate grounds: (1) the Tax Injunction Act (28 U. S. C. § 1341) precludes federal jurisdiction because (a) there was no exhaustion of State remedies until the Illinois Court had decided the later-filed petition for rehearing, and (b) the alternative (legal) procedure had provided a "plain, speedy, and efficient" State remedy; and, (2) even if the Act were inapplicable, (a) a federal court must abstain while a petition for rehearing in the State Court was pending, and (b) *res judicata*.

An appeal to the United States Court of Appeals for the Seventh Circuit is now pending. As of this writing all the briefs are in, but the case has not yet been set for oral argument. Plaintiff has suggested that the Court of Appeals defer action until this appeal is resolved.

32. This has since been dismissed, App. D., *post* at p. A13, and an appeal to the U. S. Court of Appeals for the Seventh Circuit is now pending. No. 78-1392.

33. On July 29, 1976, the Circuit Court of Cook County had entered an order of judgment and sale of the taxes. Payment was necessary to avoid loss of the hotel. *Ward* v. *Love County*, 253 U. S. 17, 23 (1920).

34. App. D., *post* at p. A13.

THE QUESTIONS ARE SUBSTANTIAL.

The issues involved in this appeal directly affect between eight and twenty thousand Cook County taxpayers per year who, for each of the six years that the certificate of error statute was in effect, have unwittingly exposed their property assessments and taxes to a procedure which does not even purport to grant some of the basic elements of due process—notice, hearing, and decision on the record. These taxpayers have now been held to have surrendered their constitutional rights to a Board which is notorious[35] for its arbitrary rulings, and whose rulings on certificates of error have now been held not to be open to participation by taxpayers or to challenge in the State courts even when constructive fraud is asserted and admitted.

35. A former member of the Board, Keane, in *Real Estate Assessment and Appeal Procedure*, 40 CHI. B. REC. 205-06 (1959), made the statement that:

> "The decisions of the Illinois Supreme Court and the Appellate Court relating to matters which came before the Board and came before those courts on appeal, would seem to give the Board of Appeals almost unlimited authority to do anything and everything that it wanted to do. The decisions have said that the Board of Appeals can make changes based purely upon its knowledge and information without any evidence; that the Board need not take evidence under oath; that the Board need not document the reasons that persuaded it to make a change; that it need not keep any records with respect to any change which has been made."

GANZ (p. 78), *supra* at n. 2, terms the system "unconscionable and without any rational factual basis."

An article in the Chicago Tribune for March 19, 1978, § 1, p. 6, notes the many actual abuses, observing that the Board is not composed of persons with administrative expertise, but of two elected officials. These two have a reelection campaign fund of $325,000; "Of 51 contributions of $1,000 or more that they have received in the last twenty months, 46 have been from lawyers." One attorney "when asked if his contributions were solicited by board members, said 'I'd rather not talk about it'."

Recently, for "the first time in the 46-year history of the board," the Circuit Court of Cook County required the Board to give reasons for one of its decisions. Chicago Tribune, June 16, 1978, § 2, p. 2.

Indirectly, the implications of this case are even more far-reaching. Should the decision below be condoned, the Due Process guarantees of the Fifth and the Fourteenth Amendments can be avoided or evaded not only in tax assessment procedures, but in all other proceedings requiring due process on the part of a State or federal agency. Merely by providing two separate and distinct procedures, one of them being an expeditious summary one not requiring a hearing nor giving a person any right to participate, and conditioning access to that procedure on the initial approval of one official, a government can entice persons unwittingly to waive their rights. Then, by delaying final approval under that procedure until no other procedures are available, and then precluding any right to challenge the procedure on any ground, including fraud, a government can deprive persons of their property without any of the Due Process guarantees provided by the Fifth or the Fourteenth Amendments.

Moreover, the holding of the Supreme Court of Illinois in the case at bar overlooks the rights of Cook County taxpayers under the Due Process clause of the Fourteenth Amendment of the U. S. Constitution. It avoids by silence, and it is irreconcilable with, decisions of this Court which hold that a State may not offer a taxpayer a choice of alternative procedures, and then excuse the failure of the one chosen to afford a hearing on the ground that a different one should have been selected—particularly when the other procedure was not as a practical matter available.

POINT 1.

The Illinois Statute, and the Decision of the Court Below, Are Irreconcilable with the Due Process Requirements of the Fourteenth Amendment.

The holding of the Illinois Supreme Court that there need not be a Constitutionally adequate procedure under one of two "separate and distinct" assessment review procedures, where the taxpayer could at one time have elected to have used the other,

valid, one, is directly in conflict with *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127 (1907).

The Illinois Court held that the plaintiff had no right to "challenge any alleged irregularities" in the Board's proceeding—including the charges that it was totally devoid of the Due Process guarantees of the Fourteenth Amendment and that it resulted in a fraudulent assessment and tax—because the certificate of error procedure was "separate and distinct" from the legal remedy. Inasmuch as the *alternative* legal procedure afforded "due process", it was unnecessary, according to the Illinois Court, that *this* remedy offer "due process." It held:

> "We hold that section 123 did not require the board of appeals to hold a hearing concerning the certificate of error and plaintiff had neither a statutory nor constitutional right to participate in the certificate of error proceeding or to challenge any alleged irregularities in that proceeding."[36]

With all respect to the Illinois Supreme Court, the only way it could have reached such a conclusion was to disregard *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127 (1907). That case has been cited and applied numerous times by this Court and by many other courts—including the Illinois Supreme Court—and has never been questioned in the least.

The parallel between *Central of Georgia* and the instant case is striking; the precedent is indistinguishable and, we submit, controlling. There, as here, the legislature provided two methods of assessing property; there, as here, the first offered notice and hearing, but the second did not. Review of the second could only be had if there was bad faith on the part of the assessment officials.

This Court in *Central of Georgia* held that the infirm second procedure was not saved by the valid first one; the very vice of the two procedures was that only one afforded Constitutional guarantees. This Court said, in language which could be applied here with little change:

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36. App. A., *post* at p. A6.

"[In the second procedure] the taxpayer has no right to be heard, having by his failure to return submitted himself to 'the doom of the assessor'." (207 U. S. at 137, 138.)

"Under the scheme provided for, if the property is withheld from return, the comptroller, without notice or opportunity for hearing, must proceed to value the property, and his valuation is final and conclusive, unless the taxpayer can show—a very unlikely contingency—that the taxing officer has acted in bad faith in making the assessment". (*Id.* at 138, 139.)

"Reluctant as we are to interfere with the enforcement of the tax laws of a State, we are constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the Fourteenth Amendment to protect against impairment by state action." (*Id.* at 141, 142.)

The only distinction between *Central of Georgia* and the instant case is an *a fortiori* one. In the instant case, the Illinois Court has held that the Board's certificate of error proceeding is non-reviewable even in the presence of (constructive) bad faith on the part of the Board.

POINT 2.

The Illinois Statute, by Not Requiring Notice and Hearing, Is Unconstitutional on Its Face.

The decision of the Court below was that the statute in question does not require a hearing, and that the General Assembly did not intend that there be a hearing for such an "expeditious summary process," or that there be "participation by the taxpayer". While an "expeditious summary process" for correcting assessment errors is manifestly a desirable goal, the Illinois Court failed to recognize that if the correction was not endorsed by the Board, this process resulted in an assessment procedure without any right of "participation by the taxpayer" at any stage.

Failure of the statute to require a hearing renders it repugnant on its face to the Due Process clause. See *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127, 138 (1907):

> ". . . [B]efore an assessment of taxes could be made on omitted property notice to the taxpayer with an opportunity to be heard was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."

If a Constitutionally adequate notice and hearing could be "awarded as a mere matter of favor or grace," it could be withheld as a mere matter of whim or caprice. Yet the Illinois Court squarely held:

> ". . . [The statute] made no provision for participation by the taxpayer in the certificate of error process or for a hearing before either the assessor or the board of appeals."
>
> ". . . We are of the opinion that the General Assembly intended the certificate of error procedure to be an expeditious summary process, without participation by the taxpayer, for correcting the assessor's errors."[37]

POINT 3.

A State Cannot, Consistent with Due Process, Require a Taxpayer to Exhaust Its Legal Remedy When in Fact Such Remedy Was Not Available at That Time.

The holding of the Illinois Court that the plaintiff should have exhausted its legal remedy (by filing a valuation complaint with the Board, and, if unavailing, by paying the tax in full and objecting at the Collector's action), subsumes that the legal remedy was in fact available. In practical reality it was not. We asserted in the Illinois Court, and the defendants have not contested, that the Board would dismiss a valuation complaint filed by a taxpayer when a certificate of error submitted by the Assessor was pending.

37. App. A., *post* at pp. A5 and A6.

We had called the Illinois Supreme Court's attention to the unavailability of the legal remedy. In our brief we asked the defendants to reveal how many of the eight to twenty thousand or so taxpayers who annually receive certificates of error also filed valuation complaints before the Board (it was estimated at no more than 10%),[38] and asked also how many taxpayers who had such certificates perfected their legal remedy by paying their uncorrected taxes in full. No answers from the defendants were forthcoming.

By post-argument letter to the Clerk of the Illinois Court, and in our petition for rehearing, we emphasize to the Court the congruent holding of *Brinkerhoff-Faris* v. *Hill*, 281 U. S. 673 (1930). No response from the Court was forthcoming.

The holding of the Supreme Court of Illinois in the case at bar conflicts directly with *Brinkerhoff-Faris*. There as here, the State court required exhaustion of an administrative precondition to a remedy at law, which precondition in fact was then not available. The parallel between the two cases is inescapable:

Brinkerhoff-Faris	*Chicago-Sheraton*
In theory, a legal remedy was available. (Appeal from holding of state tax commission.)	*Same.* (Objection to Collector's action.)
The legal remedy was conditioned on prior exhaustion of administrative remedy. (File complaint with state tax commission.)	*Same.* (File valuation complaint with the Board.)
In fact the administrative remedy was not available. (Prior cases had held that the commission lacked power to hear the complaint.)	*Same.* (The Board would dismiss appeals where a certificate of error was pending; in any event, no more than 10% of the Certificate of Error holders ever filed complaints with the Board.)

38. See *supra* at n. 30.

At the time in question, an equitable remedy was not conditioned on exhaustion of the administrative precondition to the legal remedy.	*Same.* (Prior to *Clarendon Associates* v. *Korzen*, 56 Ill. 2d 101, 306 N. E. 2d 299 (1974), there was no requirement of exhaustion of an administrative remedy or the absence of an adequate legal remedy to pursue an equitable one.)
The State court, subsequent to the time in question, required absence of an adequate legal remedy as a condition for an equitable remedy. (Holding of the court.)	*Same.* (Holding of *Clarendon.*)
It was then too late to apply for the legal remedy. (Time bar.)	*Same.*

There is no material difference between *Brinkerhoff-Faris* and the case at bar. Requiring a taxpayer to take a legal remedy, when in fact or in practice no such remedy is available, is the antitheisis of Due Process. The *Brinkerhoff-Faris* language could be applied here without modification:

> "The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.
>
> "*Second*. If the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action

through its judicial as well as through its legislative, executive, or administrative branch of government." (281 U. S. at 679, 680; citations omitted.)

". . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule [a prior] case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." (*Id.* at 681, 682.)

Thus, in 1973 the plaintiff here could have obtained review of its assessment by certificate of error or via an equitable procedure—it could not have employed the legal remedy because a valuation complaint would have been dismissed. But in 1976, when the Board refused to endorse the certificates of error, the equitable remedy was no longer available as a result of *Clarendon*, and it was too late to apply for the legal one. Where has the plaintiff had "some real opportunity to protect it[s right]"?

POINT 4.

Where a State Provides Alternative Procedures, It Must Insure That All of Those Procedures Conform to Due Process Standards.

What is so disturbing about the decision below is that it allows and encourages a State to entice taxpayers unwittingly to waive their rights under the Due Process clause. Indeed, not only in State taxation matters, but by implication in all govern-

ment procedures, it permits a government agency to circumvent the guarantees of due process provided by either the Fifth or the Fourteenth Amendments.

Here the State provided two separate and distinct assessment correction procedures—the "cumbersome"[39] legal one which required a timely hearing, payment in full under protest, and objection in court; and the "expeditious summary" administrative (certificate of error) one which needed no hearing, called for payment of only the correct part of the tax, and required no objection in court. All a taxpayer need do in order to use the administrative procedure was to obtain the Assessor's concession that the error was his fault. Obviously a taxpayer who can will opt for the latter, as indeed almost half of the Cook County taxpayers whose property was erroneously assessed have done. And if the Board will endorse the certificates, the system works.

But if, as here, the Board ultimately (and three years later) refuses to endorse—either for any reason or for no reason—the result is outrageous. Not only must the taxpayer then pay the tax in full, but he must pay an interest penalty dating from the time his tax originally should have been paid.

And when, as here, consideration of the endorsement is delayed beyond the time for perfecting an alternative procedure, the consequences are even more egregious. The taxpayer has not had a hearing, and cannot have a hearing. Not only can he not challenge any "irregularities" in the procedure he selected, he now has no recourse to any other procedure. In a very real sense, he has been deprived of his property without due process.

The setting up of a "procedural labyrinth . . . made up entirely of blind alleys" does no credit to the State. *Marino* v. *Ragen*, 322 U. S. 561, 567 (1947) (Rutledge, J., concurring); *Trainor* v. *Hernandez*, 431 U. S. 434, 470 (1977) (Stevens,

39. The Illinois Court has termed it "a cumbersome and ponderous process." *People ex rel. Kohorst* v. *G. M. & O. R. R.*, 22 Ill. 2d 104, 109, 174 N. E. 2d 182 (1961).

J., dissenting). When utilized, as here, to perpetrate an admittedly fraudulent assessment and to collect an admittedly fraudulent tax, it should, we submit, be condemned under the Due Process clause. As *Central of Georgia, supra,* held, when a State provides alternative assessment procedures, it must insure that *all* of those alternatives conform to Due Process standards. Taxpayers should not have to play three-card monte in order to obtain the guarantees secured to them by the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX A.

OPINION

Supreme Court
of Illinois
United States of America

STATE OF ILLINOIS
SUPREME COURT } ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of January in the year of our Lord, one thousand nine hundred and seventy-eight, within and for the State of Illinois.

Present: DANIEL P. WARD, *Chief Justice*, JUSTICE ROBERT C. UNDERWOOD, JUSTICE HOWARD C. RYAN, JUSTICE THOMAS J. MORAN, JUSTICE JOSEPH H. GOLDENHERSH, JUSTICE WILLIAM G. CLARK, JUSTICE JAMES A. DOOLEY, WILLIAM J. SCOTT, *Attorney General*, LOUIE F. DEAN, *Marshal*,

Attest: CLELL L. WOODS, *Clerk*

Be It Remembered, that afterwards, to-wit, on the 20th day of January, 1978 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

CHICAGO SHERATON CORP., an Illinois Corp., *et al.*,
Appellants,
No 49487 *vs.*
SEYMOUR ZABAN, *et al.*, etc., *et al.*, etc.,
Appellees.
} Appeal from Circuit Court, Cook County.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

Plaintiff, Chicago Sheraton Corporation, appealed from the judgment of the circuit court of Cook County entered in favor of defendants, Seymour Zaban and Harry H. Semrow, sued individually and as members of the Cook County board of appeals, and Thomas M. Tully, Stanley T. Kusper, Jr., and Edward J. Rosewell, respectively assessor, county clerk and treasurer of Cook County, upon allowance of their motion to dismiss plaintiff's action seeking an injunction and other relief. We allowed plaintiff's motion filed pursuant to Rule 302 (b) (58 Ill. 2d R. 302(b)) and ordered that the appeal be taken directly to this court.

In plaintiff's complaint containing five counts, it is alleged in counts I through IV that plaintiff is the owner of real estate located at 505 North Michigan Avenue in Chicago improved with a hotel building, that the property is located in the north quadrant of Cook County and for real estate tax purposes is comprised of four parcels of improved real estate; that the tax year 1972 was the first year of the quadrennium for the north quadrant of Cook County; that the assessor gave notice of a proposed increase in assessed valuation from $6,095,952, its assessed value during the 1968 quadrennium, to $8,315,546; that "Plaintiff complained to the Assessor and presented evidence sufficient to obtain from the Assessor a reduction in the proposed assessment of the hotel for the 1972 quadrennium to $6,090,152"; that the assessor's property record cards were formally revised to reflect the assessment reduction; that errors in transcribing data from the property record cards for entry into the assessment books or errors of calculation resulted in an assessed valuation for 1972 of $8,750,335; that the assessor's property record cards acknowledged that such errors were made; that the board of appeals certified the erroneous 1972 assessments and the treasurer extended them and sent out 1972 tax bills based on those erroneous assessments; that upon receipt of the 1972 real property tax bills plaintiff complained to the

assessor, that the assessor acknowledged the mistakes in the assessment of the property "causing to be marked on each of the bills * * * a Certificate of Error [citation] to reduce the assessments to those which he had previously determined to be correct"; that plaintiff paid the real property taxes for the year 1972 on the basis of the tax bills as corrected and relying on the said certificates of error did not pay the erroneous taxes based on the erroneous assessments; that for each succeeding year of the 1972 quadrennium, the real property taxes assessed and levied against the property were based on the assessor's revised assessments for the quadrennium; that the defendant members of the board of appeals delayed issuing statutory notice and delayed holding a hearing with respect to whether the board of appeals would endorse the certificates of error until 1976, long after the collector's 1972 annual application for judgment and order of sale; that plaintiff appeared at the hearing and presented evidence of the aforesaid mistakes, but the defendant members of the board of appeals refused to endorse the certificates of error with their concurrence. It was further alleged that the board's refusal to endorse the certificates of error was arbitrary and capricious, and resulted in an assessment increase without notice and in a constructively fraudulent assessment and tax and that plaintiff had exhausted all administrative remedies and had no adequate remedy at law. The allegations of count V will be considered later in this opinion. Defendants moved to dismiss the complaint on the grounds that plaintiff had not exhausted its administrative remedies and that it had an adequate remedy at law. Upon allowance of the motion, the circuit court dismissed plaintiff's action with prejudice and this appeal followed.

It appears from the pleadings that the notice of assessments for the 1972 quadrennium was published in a newspaper of general circulation within the assessment district and that thereafter the board of appeals gave notice by publication (Ill. Rev. Stat. 1971, ch. 120, par. 596) that from January 29, 1973,

until February 13, 1973, it would receive complaints concerning assessments for the tax year 1972. Plaintiff admittedly did not file a complaint (ch. 120, pars. 597, 598) with the board of appeals challenging the assessment.

Plaintiff contends that the assessments were grossly excessive and constructively fraudulent; that where assessments are constructively fraudulent and there is no adequate remedy at law, the diligent taxpayer may seek equitable relief; that by reason of its delay in holding a hearing the board of appeals is estopped from refusing to endorse the certificates of error; that the hearing held before the board of appeals did not meet the requirements of the due process clause and that its decision not to endorse the certificates of error is reviewable on the ground that such refusal was constructively fraudulent. It is defendants' position that the statute does not provide for participation by the taxpayer in the procedure for certificate of error and that it involves only the tax assessment officials and the court; that plaintiff had an adequate remedy at law, of which it failed to avail itself; that it should have complained of the assessment to the board of appeals, and failing to obtain relief, should have objected at the collector's application for judgment.

The statutory provisions relevant to this controversy are sections 123, 117, 118 and 194 of the Revenue Act of 1939 (Ill. Rev. Stat. 1971, ch. 120, pars. 604, 598, 599, 675). Section 123 provided:

> "In counties containing 1,000,000 or more inhabitants, if, at any time before judgment is rendered in any proceeding to collect or to enjoin the collection of taxes based upon any assessment of any property belonging to any person or corporation, the county assessor shall discover an error or mistake in such assessment, such assessor shall execute a certificate setting forth the nature of such error, and the cause or causes which operated to produce it. The certificate when endorsed by the board of appeals showing its concurrence therein, and not otherwise, may be received in evidence in any court of competent jurisdiction,

> and when so introduced in evidence such certificate shall become a part of the court records, and shall not be removed from the files except upon the order of the court.
>
> A certificate executed pursuant to this Section may be issued to the person erroneously assessed or may be presented by the assessor to the court as an objection in the application for judgment and order of sale for the year in relation to which the certificate is made." Ill. Rev. Stat. 1971, ch. 120, par. 604.

Sections 117 and 118 provided that any taxpayer believing his property "is over assessed or under assessed or is exempt" may also file a written complaint with the board of appeals which, after a hearing, may order the assessment corrected. (Ch. 120, pars. 598, 599.) Under the provisions of section 194, if the taxpayer is not satisfied with the order of the board of appeals, he may pay the tax under protest (ch. 120, par. 675) and object to the collector's application for judgment and order of sale, thus obtaining judicial review of the assessment and tax. An examination of the statutory scheme shows that the certificate of error procedure provided in section 123 is intended to be separate and distinct from the procedure available to a taxpaper under sections 117, 118 and 194.

Prior to the amendment effected by the enactment of Public Act 77–1466 (approved September 7, 1971) section 123 (Ill. Rev. Stat. 1969, ch. 120, par. 604) provided that if at any time before judgment was rendered in any proceeding to collect or enjoin the collection of taxes the board of appeals discovered "an error or mistake (other than errors of judgment as to the valuation of any real or personal property)," it could issue a certificate of error. If the county assessor endorsed his concurrence in the certificate of error, it could be received in evidence in any court of competent jurisdiction. Unlike section 122 (ch. 120, par. 603), which expressly provided for notice to the taxpayer and a hearing, section 123 either before or after amendment made no provision for participation by the taxpayer in the certificate of error process or for a hearing before either the assessor or the board of appeals.

Plaintiff contends that notice and hearing are implicit in the proceeding and to interpret the statute to require neither notice nor hearing would render it violative of the due process clause. It argues, too, that the General Assembly clearly intended that the assessor and board of appeals execute the certificate in time for it to be presented as an objection in the collector's application for judgment and order of sale and that a delay of three years in setting the hearing violated the statute. We do not agree. We are of the opinion that the General Assembly intended the certificate of error procedure to be an expeditious summary process, without participation by the taxpayer, for correcting the assessor's errors. The requirements of due process are "that the property owner be given notice and an opportunity to be heard upon the valuation of his property at some point in the taxing process before his liability to pay the tax becomes conclusively established" and that "the taxpayer is not entitled to notice and an opportunity to be heard at each stage, or at any particular stage, of the assessment procedure." (*Dietman* v. *Hunter*, 5 Ill. 2d 486, 489. See also *Little Sister Coal Corp.* v. *Dawson*, 45 Ill. 2d 342.) Plaintiff does not dispute that the assessor published notice of the quadrennial assessment as provided in section 104 (ch. 120, par. 585) and that the board of appeals gave notice of its meetings as required by section 115 (ch. 120, par. 596). We hold that section 123 did not require the board of appeals to hold a hearing concerning the certificate of error and plaintiff had neither a statutory nor constitutional right to participate in the certificate of error proceeding or to challenge any alleged irregularities in that proceeding.

We consider next plaintiff's contention that the decision of the board of appeals is reviewable "where it is charged that there was actual or constructive fraud." The judgment of the circuit court having been entered upon allowance of defendants' motion to dismiss, the allegation that the quadrennial assessment was constructively fraudulent must be taken as true (*Acorn Auto Driving School, Inc.* v. *Board of Education*, 27 Ill. 2d 93), and

defendants concede that at this stage of the case "there is no dispute as to the quadrennial assessment being constructively fraudulent." They contend, however, that under *Clarendon Associates* v. *Korzen*, 56 Ill. 2d 101, equitable relief must be denied. *Clarendon* presented squarely the question whether equity will enjoin the collection of taxes based on constructively fraudulent assessments. After citing early cases allowing the equitable remedy, discussing the enactment and purpose of the 1933 amendments to the Revenue Act of 1872 which required the payment of at least 75% of the tax under protest as a condition precedent to the filing of an objection to the application for judgment, and recognizing that *dictum* in cases decided subsequent to the 1933 amendments indicated that equity might grant relief from a constructively fraudulent assessment, the court held that equity will not enjoin the collection of taxes based on a constructively fraudulent assessment unless the assessment is so fraudulently excessive as to render the remedy at law unavailable to the plaintiff. (See also *La Salle National Bank* v. *County of Cook*, 57 Ill. 2d 318.) We find no basis in this record to hold this exception applicable.

We consider now plaintiff's contention that defendants are estopped from refusing to endorse the certificates of error. Plaintiff argues that because it relied upon the 1972 certificate of error it did not pay the erroneously assessed taxes and therefore could not object to the collector's 1972 annual application for judgment and order of sale. It argues that because the collector "computed the tax bills based on the Certificates of Error, accepted the correct payment and receipted the bills" it "did not perfect alternative remedies." Exhibits attached to the pleadings show that the time for filing a complaint before the board of appeals was from January 29, 1973, until February 13, 1973. Plaintiff did not file a complaint with the board of appeals within that period. The exhibits also show that the assessor did not enter the certificates of error until May 3, 1973, approximately three months after the last date on which a complaint could have

been filed before the board. Under these circumstances we fail to perceive in what manner plaintiff was prejudiced. Clearly, plaintiff's situation would not have been any different had the board refused to endorse the certificates of error on the day they were entered by the assessor. Having failed to timely file a complaint before the board, plaintiff was precluded from pursuing the statutory remedy of objection in the collector's application for judgment proceeding. (*People ex rel. Korzen* v. *Fulton Market Cold Storage Co.*, 62 Ill. 2d 443.) We find no basis for holding that the board of appeals is estopped from refusing to endorse the certificates.

We consider now the allegations of count V of plaintiff's complaint. In this count plaintiff seeks "recovery in favor of the People of the State of Illinois for the use of Chicago Sheraton Corporation" against the defendant members of the board of appeals, jointly and severally. The action is based upon section 323 of the Revenue Act (Ill. Rev. Stat. 1971, ch. 120, par. 804), which in pertinent part provides that "Every county clerk, assessor, collector or other officer who shall in any case refuse or knowingly neglect to perform any duty enjoined upon him by this Act * * * shall * * * be liable, on the complaint of any person, for double the amount of the loss or damage caused thereby * * *." It was alleged that the assessor "has a statutory duty to equitably and uniformly assess all taxable property" and "to propose Certificates of Error in the event of overassessments"; that the members of the board of appeals have a statutory duty "of ordering correction of overassessments"; that the members of the board "by their refusal to endorse their concurrence to the Assessor's proposed Certificates of Error" for the hotel "knowingly neglected or refused to perform their statutory duty of ordering correction of overassessments"; and that "By reason of such neglect or refusal, Plaintiff Chicago Sheraton Corporation has incurred losses or damages, including attorneys' fees for bringing on and prosecuting the within action."

To recover on this count, plaintiff would be required to prove an "overassessment" and the board's refusal or "knowing neglect" to correct the "overassessment." Under the relevant statutes plaintiff had the right to file a complaint with the board of appeals and challenge the "erroneous" assessment, and if the board failed to correct the "overassessment," file an objection based on the "overassessment" at the collector's application for judgment and obtain a judicial determination of the correctness of the assessment. Having failed to pursue this remedy, plaintiff obviously cannot recover double damages based on the board's alleged refusal or "knowing neglect" to correct the "overassessment." If plaintiff's theory of liability were adopted, a taxpayer could elect not to follow the statutory procedure and instead attempt to prove an "overassessment" in an action of this type with the possibility of recovering *"double"* the amount of the saving which could have been effected by proving "overassessment" before the assessor, the board of appeals or in the collector's application for judgment proceeding.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

APPENDIX B.

State of Illinois
Office of
CLERK OF THE SUPREME COURT
Springfield
62706

Clell L. Woods
Clerk

Telephone
Area Code 217
762-2035

March 30, 1978

Mr. Gerald Rose
Attorney at Law
Leydig, Voit, Osann,
Mayer & Holt, Ltd.
Suite 4600
One IBM Plaza
Chicago, Illinois 60611

No. 49487—Chicago Sheraton Corp., an Illinois Corp., et al., appellants, vs. Seymour Zaban, et al., etc., et al., etc., appellees. Appeal, Circuit Court (Cook).

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ CLELL L. WOODS
Clerk of the Supreme Court

APPENDIX C.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

CHICAGO SHERATON CORP., an Illinois Corp., and PEOPLE OF THE STATE OF ILLINOIS for the use of Chicago Sheraton Corp., *Plaintiffs,* *vs.* SEYMOUR ZABAN and HARRY H. SEMROW, individually and as members of the Cook County Board of Appeals; THOMAS M. TULLY, Cook County Assessor; STANLEY T. KUSPER, JR., Cook County Clerk; and EDWARD J. ROSEWELL, Cook County Treasurer, *Defendants.*	No. 76 CH 6042

ORDER

This cause coming to be heard on the Motion of the defendants, by their attorneys, Bernard Carey, State's Attorney of Cook County and Thomas D. Rafter, Assistant State's Attorney, to strike and dismiss the complaint, due notice served, and the Court having considered the memoranda filed by the parties and having heard counsel.

IT IS HEREBY ORDERED that the case be dismissed with prejudice.

IT IS FURTHER ORDERED that there is no just reason for delaying enforcement or appeal of this order.

BERNARD CAREY, State's Attorney
By: Thomas D. Rafter
Assistant States Attorney
for Defendants
500 Richard J. Daley Center
Chicago, Illinois 60602
443-5444

ENTER:

ARCHIBALD J. CAREY, JR.

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CHICAGO SHERATON CORPORATION, an Illinois corporation,
Plaintiff,
vs.
SEYMOUR ZABAN, et al.,
Defendants.
No. 78 C 463

ORDER

Since plaintiff's payment of the disputed tax has mooted their request to enjoin the tax's collection, the plaintiff's remaining requests are for a declaration that the tax collection denies due process and equal protection and for an injunction ordering the county to set aside the disputed amount plaintiff has paid in an interest bearing account. We believe plaintiff's complaint must be dismissed for several reasons.

The Tax Injunction Act provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341. It is settled that the policy of this Act applies to both injunctive and declaratory relief. *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293 (1943); *Illinois Central R. R. Co.* v. *Howlett,* 525 F. 2d 178 (7th Cir. 1975), *cert. denied* 424 U. S. 976 (1976). Plaintiff argues that the Act should no longer apply because this action now seeks a refund rather than

to enjoin collection. The majority of courts, however, have held that actions seeking refund of a State tax are within the scope of the Act. *Kelly* v. *Springett*, 527 F. 2d 1090 (9th Cir. 1975). The Tax Injunction Act therefore bars the plaintiff's requested relief for the following reasons:

1. The plaintiff has filed a petition for a rehearing before the Illinois Supreme Court. Until that court has decided the petition, the plaintiff has not exhausted its State remedies and the federal district court is without jurisdiction. *Bland* v. *McHann*, 463 F. 2d 21 (5th Cir. 1972), *cert. denied* 410 U. S. 966 (1973).

2. It is clear that plaintiff had a "plain, speedy, and efficient" remedy for a constructively fraudulent assessment. *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F. 2d 439 (7th Cir. 1975). The plaintiff's failure to follow the State procedure for protesting the allegedly fraudulent assessment does not make the plaintiff's State remedies so inadequate that the "plain, speedy, and efficient remedy" exception of § 1341 applies. *Aluminum Co. of America* v. *Department of the Treasury of the State of Michigan*, 522 F. 2d 1120 (6th Cir. 1975); *Kiker* v. *Hefner*, 409 F. 2d 1067 (5th Cir. 1969).

Even if the Tax Injunction Act did not apply to any part of the relief plaintiff is seeking, there are several reasons this proceeding is improper and should be dismissed:

1. Until the Illinois Supreme Court decides plaintiff's petition for rehearing, the principles of comity and federalism require that a federal district court abstain from deciding a question which is being litigated before the state courts. *Juidice* v. *Vail*, 430 U. S. 327 (1977).

2. It appears that plaintiff raised and litigated its federal claim of denial of due process before the Illinois Supreme Court without any attempt to reserve these questions for federal court decision and that the Illinois Supreme Court decided the federal due process claim. (Brief and Argument for Plaintiffs-Appellants in the Supreme Court of Illinois, p. 25, Complaint, Exhibit D); (*Chicago Sheraton* v. *Zaban*, No. 49487, p. 4 (Jan. 20, 1978); Complaint, Exhibit G). Having once had the opportunity to litigate its federal claims before a competent tribunal, plaintiff is now barred from collaterally attacking that court's decision by res judicata. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964); *Mr. Boston Distiller Corp.* v. *Pallott*, 342 F. Supp. 770 (N. D. Fla. 1972), *aff'd per curiam*, 469 F. 2d 337. If plaintiff seeks to attack the Illinois Supreme Court decision on the federal due process issue, the proper means is by certiorari to the United States Supreme Court.

It is not clear whether plaintiff raised its equal protection claim before the Illinois Supreme Court. If it did not expressly reserve this federal law issue, then the equal protection claim is barred by res judicata as one that might have been raised.

3. As to the injunctive relief plaintiff seeks, there has been no showing of irreparable injury. If plaintiff should prevail before the Illinois Supreme Court or the United States Supreme Court, there is no reason to believe that the county will be unable or unwilling to refund the amount of tax plaintiff has paid. Plaintiff's loss of interest on the tax paid is simply not the type of injury needed to invoke equity.

For the foregoing reasons, plaintiff's complaint is dismissed.

Dated: February 27, 1978.

Enter:

/s/ JOHN F. GRADY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CHICAGO SHERATON CORPORATION, an Illinois Corporation,
Plaintiffs,
vs.
SEYMOUR ZABAN, et al.,
Defendants.
No. 78 C 463

JUDGMENT ORDER

This cause came on to be heard on the motion of defendants to dismiss the complaint against them, and the court having granted said motion for the reasons stated in our Order of February 27, 1978, it is hereby

ORDERED, ADJUDGED AND DECREED that judgment be entered herein in the defendants' favor dismissing the action.

Dated: February 27, 1978.

Enter:

/s/ JOHN F. GRADY
United States District Judge

APPENDIX E.

SECTION 123 OF THE "REVENUE ACT OF 1939"

Prior to September 7, 1971

§ 604. USE OF CERTIFICATES OF ERROR AS EVIDENCE IN COURT

In counties containing 500,000 or more inhabitants, if, at any time before judgment is rendered in any proceeding to collect or to enjoin the collection of taxes based upon any assessment of any property belonging to any person or corporation, the board of appeals shall discover an error or mistake (other than errors of judgment as to the valuation of any real or personal property) in such assessment, such board shall issue a certificate setting forth the nature of such error, and the cause or causes which operated to produce it, to the person erroneously assessed, which certificate when endorsed by the county assessor showing his concurrence therein, and not otherwise, may be received in evidence in any court of competent jurisdiction, and when so introduced in evidence such certificate shall become a part of the court records, and shall not be removed from the files except upon the order of the court.

1939, May 17, Laws 1939, p. 886, § 123.

[S. H. A. ch. 120, § 604]

(N.B.: The above statute was amended effective September 7, 1971, by P. A. 77-1466. The note in *Smith-Hurd Illinois Annotated Statutes,* 1978 Pocket Part, reads:

P. A. 77-1466 reversed the roles of the county assessor and the board of appeals so that now the county assessor, rather than the board of appeals, discovering an error executes the certificate, and the board of appeals, rather than the assessor as formerly, endorses its concurrence.

The same amendment eliminated the restriction that the error or mistake be one "(other than errors of judgment as to the valuation of any real or personal property)"; and added the concluding paragraph.)

APPENDIX F.

SECTION 123 OF THE "REVENUE ACT OF 1939"

Subsequent to August 1, 1977

1977 Regular Session

REVENUE—ASSESSMENTS—CERTIFICATES OF ERROR

Public Act 80-158

Senate Bill 596

An Act to amend Section 123 of the "Revenue Act of 1939", filed May 17, 1939, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 123 of the "Revenue Act of 1939", filed May 17, 1939, as amended, is amended to read as follows:

Sec. 123. [S. H. A. ch. 120, § 604]

In counties containing 1,000,000 or more inhabitants, if, at any time before judgment is rendered in any proceeding to collect or to enjoin the collection of taxes based upon any assessment of any property belonging to any person or corporation, the county assessor shall discover an error or mistake in such assessment, such assessor shall execute a certificate setting forth the nature of such error, and the cause or causes which operated to produce it. The certificate when endorsed by the county assessor, or when endorsed by the county assessor and board of appeals where the certificate is executed for any assessment which was the subject of a complaint filed in the board of appeals for the tax year for which the certificate is issued, may be received in evidence in any court of competent jurisdiction when so introduced in evidence such certificate shall become a part of the court records, and shall not be removed from the files except upon the order of the court.

A certificate executed pursuant to this Section may be issued to the person erroneously assessed or may be presented by the assessor to the court as an objection in the application for judgment and order of sale for the year in relation to which the certificate is made.

Section 2. [S. H. A. ch. 120, § 604 note] This amendatory Act of 1977 takes effect on its becoming law and shall be applicable to all certificates of error previously executed by the county assessor but not finally adjudicated by a court of competent jurisdiction.

Approved and effective Aug. 1, 1977.

(N.B.: The above statute is the result of an amendment dated August 1, 1977, P. A. 80-158. The note in *Smith-Hurd Illinois Annotated Statutes*, 1978 Pocket Part, reads:

P. A. 80-158 substituted the words "the county assessor, or when endorsed by the assessor and board of appeals where the certificate is executed for any assessment which was the subject of a complaint filed in the board of appeals for the tax year for which the certificate is "issued" for "the board of appeals showing its concurrence therein, and not otherwise".

Section 2 of P. A. 80-158, approved Aug. 1, 1977, provided:

"This amendatory Act of 1977 takes effect on its becoming law and shall be applicable to all certificates of error previously executed by the county assessor but not finally adjudicated by a court of competent jurisdiction.")

APPENDIX G.

IN THE

SUPREME COURT OF ILLINOIS

CHICAGO SHERATON CORP., an Illinois Corporation, and PEOPLE OF THE STATE OF ILLINOIS for the use of CHICAGO SHERATON CORPORATION, *Plaintiffs-Appellants,* *vs.* SEYMOUR ZABAN and HARRY H. SEMROW, individually and as Members of the Cook County Board of Appeals; THOMAS M. TULLY, Cook County Assessor; STANLEY T. KUSPER, JR., Cook County Clerk; and EDWARD J. ROSEWELL, Cook County Treasurer, *Defendants-Appellees.*	Docket No. 49487

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Chicago Sheraton Corporation, an Illinois Corporation, and People of the State of Illinois for the use of Chicago Sheraton Corporation, the appellants above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Illinois, entered on January 20, 1978 (rehearing denied, March 30, 1978), affirming the dismissal of the com-

plaint, entered in this action by the Circuit Court of Cook County, Illinois on April 4, 1977.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

CHICAGO SHERATON CORPORATION et al.
By /s/ GERALD ROSE
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CERTIFICATE OF SERVICE

I hereby certify that on Thursday, May 11, 1978 two (2) copies of the foregoing Notice of Appeal to the Supreme Court of the United States to be served upon Counsel for the Defendants-Appellees, Bernard Carey, State's Attorney of Cook County, and Michael F. Baccash, Asst. State's Attorney, by mailing said copies, first class postage prepaid, addressed to them at 500 Richard J. Daley Center, Chicago, Illinois 60602.

/s/ GERALD ROSE
Gerald Rose
Counsel for Appellant

Supreme Court, U. S.
FILED
JUL 19 1978
MICHAEL RODAK, JR., CLERK

No. 77-1849

In the
Supreme Court of the United States
October Term, 1977

CHICAGO SHERATON CORPORATION, an Illinois Corporation,
Appellant,

vs.

SEYMOUR ZABAN, et al.,
Appellees.

Appeal from the Supreme Court of Illinois.

MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1849

CHICAGO SHERATON CORPORATION, an Illinois Corporation,

Appellant,

vs.

SEYMOUR ZABAN, et al.,

Appellees.

Appeal from the Supreme Court of Illinois.

MOTION TO DISMISS OR AFFIRM

The defendants-appellees in the above-entitled cause resepctfully move this Court to dismiss this appeal on the grounds that the questions presented are so insubstantial as not to need further argument. Alternatively, the defendants-appellees move that the judgment of the Illinois Supreme Court be affirmed since it is clearly correct.

ARGUMENT

I.

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT BECAUSE THE TAXPAYER HAD AN AVAILABLE REMEDY TO CHALLENGE THE ALLEGED OVERASSESSMENT.

The Illinois Supreme Court has held that a taxpayer has no statutory or constitutional right to participate in Illinois real estate Certificate of Error proceedings. (App. A, p. A6) Rather, the Certificate of Error proceeding is one that involves only the tax officials and the court. The taxpayer's remedy is by way of paying the allegedly excessive taxes under protest, and then objecting in court in a proceeding separate from the Certificate of Error proceeding. Ill. Rev. Stat. 1971, ch. 120, secs. 675 and 716.

This Court has held on numerous occasions that due process requires only that the taxpayer be heard at some stage of the taxing process before the tax becomes final:

> ". . . if the legislature of the state, instead of fixing the tax itself, commits to the subordinate body the duty of determining whether, and in what amount, and upon whom the tax shall be levied, due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer must have the opportunity to be heard, of which he must have notice whether personal, by publication, or by some statute fixing the time and place of hearing." [*Turner* v. *Wade,* 254 U.S. 64 at 68, 41 S.Ct. 27 at 28, 65 L.Ed. 134 at 137 (1920).]

This Court has noted this holding in many cases. *Londoner* v. *Denver,* 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 103 (1908); *Winona & St. Paul Land Co.* v. *State of Minnesota,* 159 U.S. 526, 16 S.Ct. 83, 40 L.Ed. 247 (1895); *Weyerhauser* v. *Minnesota,* 176 U.S. 550, 20 S.Ct. 485, 44 L.Ed. 583 (1900).

The taxpayer argues that *Central of Georgia Ry.* v. *Wright,* 207 U.S. 127, 28 S.Ct. 47, 52 L.Ed. 134 (1907) and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) require reversal of the Illinois Supreme Court's holding. The taxpayer's reliance on these cases is misplaced. In *Central of Georgia Ry.* this Court held that even though a taxpayer did not comply with a statutory duty to "return" certain shares of stock for assessment purposes, the taxpayer still had a due process right to be heard at *some* time prior to the final fixing of liability, on the valuation issue. And *Brinkerhoff-Faris* held that a taxpayer was denied due process when the taxpayer was required by state court to seek an administrative remedy (as a prerequisite to a court hearing) which administrative remedy was never available. Neither case applies to the case at bar. The taxpayer merely failed to perfect its remedy to challenge the tax and thereafter attempted to create a remedy by misconstruing the Illinois Certificate of Error statute. Moreover, plaintiffs' suggestions (fn. 16, p. 8; p. 20, p. 22 of its Jurisdictional Statement) that it had no remedy at law because any Complaint it would have filed before the Board of Appeals would have been dismissed, is not substantiated by the record. Moreover, it is clearly erroneous: Under Illinois statutory law, the Board of Appeals does not even receive Certificates of

Error from the Assessor until *after* the Board has ruled on taxpayers' Complaints.

The federal due process law in this area is well settled and this case presents no substantial issue not previously decided by this Court. Accordingly, the appellees respectfully request this Court to dismiss or affirm this appeal.

CONCLUSION

Wherefore, appellees respectfully submit that the questions presented by this cause are so insubstantial as not to need further argument, and that the appeal should be dismissed. Alternatively, appellees respectfully submit that the judgment entered in this cause by the Illinois Supreme Court is clearly correct and should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1978

No. 77-1849

CHICAGO SHERATON CORPORATION,
AN ILLINOIS CORPORATION,
Appellant,

vs.

SEYMOUR ZABAN AND HARRY H. SEMROW, INDIVIDUALLY AND AS MEMBERS OF THE COOK COUNTY BOARD OF APPEALS; THOMAS M. TULLY, COOK COUNTY ASSESSOR; STANLEY T. KUSPER, JR., COOK COUNTY CLERK; AND EDWARD J. ROSEWELL, COOK COUNTY TREASURER,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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IN THE

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CHICAGO SHERATON CORPORATION,
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Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Even on the premise that the less said about the decision below the better, the defendants-appellees, within the space of two and one-half pages, have distorted the facts of this case and the holding of the Illinois Supreme Court, and have avoided the issues in this appeal.

(1) By adroit use of the singular rather than the plural, the defendants twice endeavor to rewrite the facts and the holding below. They initially say that:

> "The taxpayer's remedy is by way of paying the allegedly excessive taxes under protest, and then objecting in court

> in a proceeding [i.e., the 'legal' procedure] separate from the Certificate of Error proceeding." (Motion, p. 2)

They then argue that:

> "The taxpayer merely failed to perfect its remedy to challenge the tax and thereafter attempted to create a remedy by misconstruing the Illinois Certificate of Error statute." (Motion, p. 3)

First, the Illinois Supreme Court most assuredly did not say that "[t]he taxpayer's remedy"—with the implication that this was the only one—was the legal procedure. Quite the contrary. The Illinois Court necessarily held that there were two statutory procedures for taxpayers to have their assessments corrected; the legal one and the administrative one, each "separate and distinct" (App. A, at A5) from the other. (There also was a third, the equitable one, which later became unavailable (App. A, at A7).)

If there had been only one taxpayer's remedy, the legal procedure, we certainly would have taken it. Our claim here is that, once again, "[t]he trouble with Illinois is not that it offers no procedure. It is that it offers too many. . . ." *Marino* v. *Ragen*, 332 U. S. 561, 565 (1947) (Rutledge, J. concurring).

Second, "[t]his taxpayer"—again the suggestive singular—was not the only taxpayer who, as the defendants put it, "attempted to create a remedy by misreading the Illinois Certificate of Error statute" (Motion, p. 3). Some eight to twenty thousand Cook County taxpayers each year—almost half the taxpayers who sought assessment correction*—likewise did so. Would any of

* Ganz, et al., *Review of Real Estate Assessments—Cook County (Chicago)* v. *Remainder of Illinois*, 11 JOHN MARSHALL J. PRACT. & PROC. 17, 31; nn. 59, 61 (1977):

> "59. The . . . number of Certificates of Error signed by the Assessor pursuant to ILL. REV. STAT. ch. 120 § 604 (1975) for the tax years 1970 through 1975 is as follows:
>
> * * *

[Tax Year]		Certificates Error
1970	-	2,300
1971	-	1,800
1972	-	11,800

(Footnote continued on next page.)

them have taken the Certificate of Error route had they known that it would ultimately be subject to the delayed, arbitrary, and non-reviewable whim of the Board of Appeals?

(2) The defendants indirectly approach the issues in this appeal by correctly (though incompletely) summarizing *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127 (1907), as holding that there is "a due process right to be heard at *some* time prior to the final fixing of liability, on the valuation issue" (Motion, p. 3). But they make no effort to distinguish its main holding from the case at bar. Nor can they.

The taxpayer in *Central of Georgia* had precisely the choice of assessment procedures we had; a "right to be heard" under one procedure, no right under the other. This Court condemned the duality there. *Central of Georgia*, and the other cases cited by the defendants at pp. 2, 3, establish that the assessment

(Footnote continued from preceding page.)

1973	-	15,700	Real Estate
		4,300	Homestead
1974	-	4,000	Real Estate
		5,800	Homestead
1975	-	4,400	Real Estate (approx.)
		4,000	Homestead (approx.)

> Letter from Daniel Peirce, Legal Counsel to the Cook County Assessor's Office, to Alan S. Ganz (Dec. 23, 1976)."
>
> "61. The total number of complaints filed [with the Board under the 'legal' procedure] each year for the tax years 1970 through 1975 are as follows:

Tax Year		Complaints Filed
1970	-	13,496
1971	-	10,311
1972	-	16,306
1973	-	15,956
1974	-	20,090
1975	-	22,262

> Reply from Donald E. Erskine, Chief Deputy of the Board of Appeals, to letter from Alan E. Ganz (July 27, 1976)."

["Homestead" refers to certain statutory exemptions in favor of disabled veterans, persons 65 years of age or older, etc. ILL. REV. STAT., ch. 120 § 500.23, etc.; Sections 19.23, etc., of the Revenue Act.]

procedure being challenged—not some other "separate and distinct" one—must accord Due Process.

Curiously, or perhaps not so curiously, the defendants do not comment on the fact that the Board thought a hearing was required. They held a "hearing" (Juris. Stat., p. 9).

Unfortunately, we do not have the benefit of the Illinois Supreme Court's view of *Central of Georgia*. Their opinion does not cite that case.

(3) Lastly, the defendants attempt to distinguish *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930), by challenging our contention (Juris. Stat., pp. 19, 20) that the Board would dismiss a valuation complaint filed by a taxpayer holding a certificate of error, saying that the contention is "not substantiated by the record" and, by reason of the time sequence, is "clearly erroneous." (Motion, p. 3.)

But how do they explain what the "record" before the Illinois Court established, and what we have demonstrated here (Juris. Stat., p. 13, n. 30), that some certificate of error holders—"no more than 10 percent"—did in fact also file valuation complaints?

CONCLUSION.

The importance and substantiality of the questions presented have not been denied. The only claim is that this taxpayer, and tens of thousands of others, erred in allowing themselves to be enticed into following a procedure which the Illinois Supreme Court, now for the first time, holds gives them "neither a statutory nor constitutional right to participate in the certificate of error proceeding or to challenge any alleged irregularities in that proceeding" (App. A, at p. A6)—including admitted constructive fraud. When a State makes an assessment for taxing purposes, it "must, in so doing, accord the parties due process of law." *Brinkerhoff-Faris*, 281 U. S. at 682.

In light of the inability of the defendants to face the issues presented in the appeal, the need for plenary review of the action

below is indisputable. And in light of their inability to distinguish this Court's precedents, plaintiff-appellant suggests that summary reversal on the authority of *Central of Georgia* is justified.

Respectfully submitted,

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